No. 93-935

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1993

**FREEMAN UNITED COAL MINING COMPANY,**
*Petitioner,*

v.

**DONALD L. JONES,**
*Respondent,*

and

**DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS UNITED STATES DEPARTMENT OF LABOR,**
*Party-In-Interest.*

**On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit**

## PETITION FOR WRIT OF CERTIORARI

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## QUESTION PRESENTED FOR REVIEW

In claims adjudications under the Black Lung Benefits Act, the Department of Labor applies the so-called "true-doubt rule", under which a factual issue is decided in favor of a claimant where the evidence on that issue is only equally weighted and does not preponderate in favor of the claimant. The question presented is whether use of this rule contravenes the requirements of the Administrative Procedure Act, 5 U.S.C. §§551 *et seq.*, or is otherwise improper.

## RULE 28.1 LIST

Freeman United Coal Mining Company is a wholly owned subsidiary of Freeman Energy Corporation, which, in turn, is a wholly owned subsidiary of General Dynamics Corporation.

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**On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit**

## PETITION FOR WRIT OF CERTIORARI

Freeman United Coal Mining Company ("Freeman") respectfully Petitions for issuance of a writ of *certiorari* to the United States Court of Appeals for the Seventh Circuit in this case.

## OPINIONS BELOW

The opinion of the court of appeals in *Freeman United Coal Mining Co. v. OWCP*, is reported at 988 F.2d 706. (App. *infra*, A-1) The decision of the Benefits Review

Board ("BRB") dated May 19, 1981 is reported at 3 Black Lung Reporter 1-153 (MB), (Ben. Rev. Bd. 1981). (App. *infra*, H-1) The decisions of the BRB dated March 30, 1988 and March 20, 1992 are unpublished. (App. *infra*, F-1, and C-1) The decisions of the Administrative Law Judge, dated January 19, 1990, January 20, 1983 and May 28, 1980 (App. *infra*, D-1, G-1, and I-1) are unreported.

## STATEMENT OF JURISDICTION

The court of appeals entered its judgment on March 4, 1993. Freeman filed a timely petition for rehearing which was denied by the court on August 4, 1993. On October 28, 1993, Justice Stevens extended the time for filing a petition for a writ of *certiorari* to and including December 10, 1993.

The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

## RELEVANT STATUTES

1. Section 7(c) of the Administrative Procedure Act, 5 U.S.C. §556(d), provides in part:

> Except as otherwise provided by statute, the proponent of a rule or order has the burden of proof. A sanction may not be imposed or rule or order issued except on consideration of the whole record or those parts thereof cited by a party and supported by and in accordance with the reliable, probative, and substantial evidence.

2. Section 12 of the Administrative Procedure Act, 5 U.S.C. §559, provides in part:

> Subsequent statute may not be held to supersede or modify this subchapter, except to the extent that it does so expressly.

3. Section 422 of the Black Lung Benefits Act, 30 U.S.C. §932(a), provides in relevant part:

> Subject to section 28(h)(1) of the Longshore and Harbor Workers' Compensation Act Amendments of 1984, . . . provisions of Public Law 803, 69th Congress (44 Stat. 1424, approved March 4, 1927) as amended as it may be amended from time to time (other than the provisions contained in sections 1, 2, 3, 4, 8, 9, 10, 12, 13, 29, 30, 31, 32, 33, 37, 38, 41, 43, 44, 45, 46, 47, 48, 49, 50, and 51 thereof) . . . shall (except as otherwise provided in this subsection or by regulations of the Secretary and except that references in such Act to the employer shall be considered to refer to the trustees of the fund, as the Secretary considers appropriate and as is consistent with the provisions of section 9501(d) of Title 26), be applicable to each operator of a coal mine in such State with respect to death or total disability due to pneumoconiosis arising out of employment in such mine, or with respect to entitlements established in paragraph (5) of section 921(c) of this title . . .

4. Section 19(d) of the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. §919(d), provides in pertinent part:

> Notwithstanding any other provision of this chapter, any hearing held under this chapter shall be conducted in accordance with the provisions of Section 554 of Title 5.

5. Pertinent provisions of the Department of Labor's regulations implementing the Black Lung Benefits Act, 30 U.S.C. §901 *et seq.*, provide as follows:

20 C.F.R. §725.452(a):

> Except as provided in this part, all hearings shall be conducted in accordance with the provisions of 5 U.S.C. §554 *et seq.*

20 C.F.R. §727.203 provides:

> (a) Establishing interim presumption. A miner who engaged in coal mine employment for at least 10 years will be presumed to be totally disabled due to pneumoconiosis, or to have been totally disabled due to pneumoconiosis at the time of death, or death will be presumed to be due to pneumoconiosis, arising out of that employment, if one of the following medical requirements is met:
>
> (1) A chest roentgenogram (X-ray), biopsy, or autopsy establishes the existence of pneumoconiosis.
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> * * *
>
> (2) Ventilatory studies establish the presence of a chronic respiratory or pulmonary disease.
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> * * *
>
> (3) Blood gas studies which demonstrate the presence of an impairment.
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> * * *
>
> (4) Other medical evidence, including the documented opinion of a physician exercising reasoned medical judgment, establishes the presence of a totally disabling respiratory or pulmonary impairment.

## STATEMENT OF THE CASE

This case concerns the validity of the so-called "true doubt" rule, a rule which the Department of Labor has embraced in the contested adjudication of benefit claims under the Black Lung Benefits Act ("BLBA"). Although the origin of the rule has been debated in the briefs of the parties below, the rule, as characterized by the Department of Labor and the court of appeals in this case, provides that where the evidence submitted by the claimant and the party opposing the award of benefits on any necessary fact is of equal weight, i.e. is in "equipoise", the doubt is resolved in favor of the claimant. App. *infra*,

A-3; *Mullins Coal Co. v. Director, O.W.C.P.*, 484 U.S. 135, 144 n.12 (1987).

In this case, the claimant, Donald L. Jones, filed his claim for benefits under the BLBA on October 27, 1978.[1] Based on the date his claim was filed, the ALJ reviewed the evidence under the liberalized "interim regulations" set forth in 20 C.F.R. Sec. 727.203,[2] which were promulgated by the Secretary of Labor under 30 U.S.C. §902(f)(1).

Under the Part 727 regulations, if a claimant has more that ten years of qualifying coal mine employment (which Jones did) he is entitled to an "interim presumption" that he is totally disabled due to pneumoconiosis, and entitled to benefits, if he can establish the existence of pneumoconiosis by way of (1) chest x-ray; (2) ventilatory studies which meet certain standards and yield certain minimum results; (3) qualifying blood gas studies yielding certain minimum results; or (4) a "reasoned medical opinion" that the claimant suffers from a totally disabling respiratory or pulmonary impairment. 20 C.F.R. §727.203(a). If the interim presumption is thus established, the operator then is required to rebut the presumption under standards set out in 20 C.F.R. §727.203(b).

In his initial decision on the merits, the ALJ found that the claimant failed to invoke the interim presumption under any of the four standards and denied benefits. App. *infra*, I-3. The ALJ found that the medical report sub-

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[1] The claimant died in November of 1981, and his wife, Fairy Dell Jones, was substituted as a party.

[2] All claims for benefits filed before January 1, 1982 are considered under the 20 C.F.R. Pt. 727 regulations. *Mullins Coal Co. v. Director, O.W.C.P.*, 484 U.S. 135 (1987).

mitted into evidence did not contain a reasoned medical opinion, and that the x-ray evidence of record was insufficient to raise the interim presumption.

Claimant appealed this decision to the Benefits Review Board ("BRB"), which reversed and remanded. App. *infra*, H-1. The Board found that the ALJ improperly failed to invoke the interim presumption under 20 C.F.R. §727.203(a)(1) in the presence of x-ray evidence that showed the existence of pneumoconiosis and that the ALJ also improperly allowed a rereading of this x-ray to defeat the threshold showing, in violation of the regulations. The Board remanded for reevaluation of this evidence and to allow the parties to submit additional x-ray evidence. App. *infra*, H-6.

After the submission of additional x-ray evidence on remand, the ALJ had before him three readings of a single x-ray: a negative reading for pneumoconiosis by a "B" reader,[3] a positive reading by a B-reader, and a positive reading by a non-B-reader who was a board-certified radiologist. Based upon this record, the ALJ again denied benefits. He rejected the submission of the positive B reading as untimely, and credited the negative reading of the B-reader over the positive reading of the non-B-reader. App. *infra*, G-1.

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[3] "B" Readers are radiologists who have demonstrated their proficiency in assessing and classifying x-ray evidence of pneumoconiosis by successful completion of an examination conducted by or on behalf of the Department of Health & Human Services. *Consolidation Coal Co. v. Chubb*, 741 F.2d 968, 971, n.2 (7th Cir. 1984). The opinion of a "B" reader may be accorded greater weight by a fact finder than the opinion of a reader who is not certified at the "B" level. *Freeman United Coal Mining Co. v. Director, OWCP*, 988 F.2d 706, 708-9, n.2. *See also Mullins Coal Co. v. OWCP*, 484 U.S. 143, 147, n.16.

On appeal from this denial of benefits, the Board again reversed the ALJ's decision, finding that the ALJ had improperly excluded the positive "B" reading. App. *infra*, F-4. The Board further found that based on the positive readings of the "B" reader, and the Board-certified radiologist, the interim presumption was invoked under 20 C.F.R. §727.203(a)(1), and was not rebutted by Freeman under 20 C.F.R. §727.203(b). *Id.* Accordingly, the Board ordered that benefits be paid. App. *infra*, F-5.

Freeman petitioned for review of this order to the Court of Appeals for the Seventh Circuit, which reversed and remanded the BRB award, holding that the Board had exceeded its powers of review by itself weighing the medical evidence, a function which was the sole province of the ALJ. App. *infra*, E-7. The court further instructed the ALJ on remand to weigh the conflicting x-ray readings in accordance with the analysis dictated by *Mullins Coal v. Director, OWCP*, 484 U.S. at 148-149. App. *infra*, E-8.

On the second remand, the ALJ invoked the interim presumption under Section 727.203(a) through reliance on the "true doubt" rule. App. *infra*, D-2. In his decision, the ALJ ruled that based upon the equal number of readings by equally qualified radiologists, there existed "true doubt as to whether the claimant had established the presence of pneumoconiosis". *Id.* He therefore invoked the interim presumption, and further concluded that presumption of entitlement had not been rebutted under §727.203(b). Benefits were again awarded. App. *infra*, D-3.

On appeal, the BRB affirmed the decision and award of benefits by the ALJ. App. *infra*, C-6. Specifically, the Board rejected Freeman's challenge to the true doubt rule, and held that, in light of the remedial purposes of the Black Lung Benefits Act, all doubts are to be resolved

in favor of the claimant when the evidence for and against entitlement was equally weighted. App. *infra*, C-4, C-5. Freeman again appealed to the Seventh Circuit Court of Appeals.

In its Petition for Review to the Seventh Circuit Court of Appeals, Freeman argued that the true doubt rule was inconsistent with proof standards of the Administrative Procedure Act and that this variance was not justified by the text of the Black Lung Benefits Act.

The central thesis of Freeman's challenge to the true doubt rule before the court of appeals was that the rule, as defined and applied by the Department of Labor, effected a significant change in the quantum of proof required to prove a fact in administrative litigation—a change that was inconsistent with Section 7(c) of the APA, which provides:

> Except as otherwise provided by statute, the proponent of a rule or order has the burden of proof.

5 U.S.C. Section 556(d).

Section 7(c) further provides:

> A sanction may not be imposed or rule or order issued except on consideration of the whole record or those parts thereof cited by a party and supported by and in accordance with the reliable, probative, and substantial evidence.

*Id.*

As Freeman noted, this Court in *Steadman v. SEC*, 450 U.S. 91 (1981) had considered the issue of the quantum of proof necessary to prevail in a hearing conducted under the Administrative Procedure Act and had expressly found it to be a preponderance of the evidence standard. Under *Steadman*, then, use of the true doubt rule, which im-

posed a quantum of proof that was less than a preponderance, was improper. Freeman further argued that by varying the quantum of proof required under the APA, the true doubt rule also contravened the APA's rule against supersedure. 5 U.S.C. §559.

In a *per curiam* opinion, the court of appeals rejected these arguments, holding that the true doubt rule was a proper judicial construct in which to assign the burden of persuasion onto the employer in black lung hearings and was consistent with both the APA and the BLBA. App. *infra*, A-9.

In placing its *imprimatur* on the true doubt rule, the Seventh Circuit relied not on any language of the Black Lung Benefits Act itself, but on statements in its legislative history. The panel noted that the true doubt rule "derives from a Senate Report accompanying the 1972 Amendments to the black lung program which noted that the Act is 'intended to be a remedial law . . . in the absence of definitive medical conclusions there is a clear need to resolve doubts in favor of the disabled miner or his survivors.' " App. *infra*, A-6, quoting S. Rep. 92-743, 92nd Cong., 2d Sess. (1972).

In addressing the crux of Freeman's argument—that the true doubt rule cannot be used to relieve a claimant from his obligation to establish his entitlement to benefits under the BLBA by a preponderance of the evidence—the court of appeals panel, while concluding that the APA did apply to contested hearings under the Act,[4] further held that

[4] Unquestionably, the APA applies to black lung adjudications. Section 422(a) of the Black Lung Benefits Act, 30 U.S.C. §932(a), incorporates section 19(d) of the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. §919(d), which in turn requires that

(Footnote continued on following page)

Section 7(c) only required that the claimant carry a burden of production, and the burden of persuasion thus could be legislatively or judicially assigned. App. *infra*, A-9.

The court of appeals rejected Freeman's reliance on *Steadman*, holding that that decision only interpreted the last sentence of Section 7(c): "no rule or order may be issued unless it is supported by and in accordance with . . . reliable, probative, and substantial evidence." Rather, the court held that this case was controlled by the first sentence of Section 7(c), and the decision that interpreted this sentence, *NLRB v. Transportation Management*, 462 U.S. 393, 404 n.7, held that the term "burden of proof", as used in Section 7(c), meant only the burden of going forward with evidence, not the burden of persuasion. Because the true doubt rule did not relieve the claimant of this burden of production, the court of appeals reasoned, its use was not violative of the APA. App. *infra*, A-8.

Finally, the court addressed the true doubt rule's apparent inconsistency with the preponderance of the evidence standard for invocation of the interim presumption established under this Court's decision in *Mullins Coal Co. v. Director, O.W.C.P.*, 484 U.S. at 158-60. While noting that *Mullins* appeared to "cast some doubt" on the validity

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[4] *continued*
any hearing under the Longshore Act be conducted in accordance with section 5 of the APA, 5 U.S.C. §554. By regulation, the Secretary of Labor has provided that, in black lung adjudications, "hearings shall be conducted in accordance with the provisions of 5 U.S.C. §554 *et seq.*" 20 C.F.R. §725.452(a). Section 554(c)(2) says that where parties are unable to determine a controversy by consent, they are entitled to a "hearing and decision . . . in accordance with sections 556 and 557 of this title." App. *infra*, A-7, n.6.

of the true doubt rule, the court of appeals nonetheless concluded that *Mullins* "left the true doubt rule intact" and treated it "as a reasonable interpretation of the regulations.[5] App. *infra*, A-9.

Freeman filed a Petition for Rehearing and a Suggestion for Rehearing *en banc*, contending, *inter alia*, that the court of appeals panel had misapprehended both the tenor of this Court's rulings in *Steadman* and *Transportation Management*, and its treatment of the true doubt rule in *Mullins*. The Petition also noted that in the period of time since the Court's initial opinion was issued, the Court of Appeals for the Third Circuit had issued its decision in *Greenwich Collieries v. Director, OWCP*, 990 F.2d 730 (3d Cir. 1993), which had evaluated the use of the true doubt rule and held it to be invalid under the APA.

The court of appeals denied Freeman's Petition for rehearing *per curiam* on August 4, 1993. App. *infra*, B-1. However, the order denying rehearing was accompanied by the statement from Judge Easterbrook, joined by Judge Posner, which questioned the reasoning of the panel's opinion in several respects. With respect to the panel's reliance on language from the Senate Report as authority for the rule, Judge Easterbrook observed: "Of course, rules of law do not come from legislative reports. They come from statutes. Legislative history may on occasion be useful in interpreting ambiguous statutory language, but neither the panel nor the BRB identified any text that this snippet might decode." App. *infra*, B-3.

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[5] In *Mullins Coal*, 484 U.S. 154, n.12, this Court addressed the true doubt rule in a footnote, acknowledging, without comment, that the Secretary of Labor has long stated that the Act embodies the principle that doubt is to be resolved in favor of the claimant.

Noting that certain of the Act's more generous evidentiary presumptions—including those at issue here—had in fact been repealed for claims filed after 1981, Judge Easterbrook went on to highlight the logical fallacy underlying a blanket conclusion that the Act's remedial, humanitarian purposes *alone* justified adoption of the true doubt rule:

> To find rules of law we must consult the statutory text. The Black Lung Benefits Act contains many substantive and evidentiary rules favorable to claimants, but no true doubt rule or any facsimile. To deploy such a rule on the basis of legislative benevolence that also accounts for the statutory presumptions is to count the magnanimous impulse twice. Tilting the burdens in miners' favor is especially questionable for claims filed in 1982 and later, for the potent presumptions that the Senate Report of 1972 sought to justify have vanished. The Benefits Review Board announced in 1978 that a true doubt rule would be employed to decide black lung cases . . . but did not use it often for pre-1982 claims . . . In recent years the rule has become ubiquitous and has on occasion been applied to pre-1982 claims, as in this case. Can it be that the Board has set out to strengthen the presumptions for pre-1982 claims and to re-create them for later ones, overriding the contrary judgment of Congress?

App. *infra*, B-4.

## REASONS FOR GRANTING THE WRIT

### I. Introduction

The issue posed by the court of appeals' decision in this case can be characterized without hyperbole as a bedrock question of administrative law: that is, what is the quantum of proof required under Section 7(c) of the APA for the issuance of an "rule or order"—in this case, an order compelling Freeman to make lifetime payments of benefits and medical expenses to the Claimant. Petitioner believes that the answer was provided by this Court in *Steadman v. SEC* with absolute clarity: "the language and legislative history of §7(c) lead us to conclude . . . that §7(c) was intended to establish a standard of proof and the standard adopted is the traditional preponderance of evidence standard." *Steadman*, 450 U.S. at 102. Freeman also believes that this principle applied with full force to claimants seeking benefits under the interim regulations of the Black Lung Benefits Act, as *Mullins* teaches that claimants must prove entitlement to the interim presumption by a preponderance of the evidence. *Mullins*, 484 U.S. at 158-60.

Application of these decisions to the case at bar would seem to compel a conclusion that evidence raising true doubt just was not enough, that "equally weighted evidence" did not, however it was cast, constitute evidence weighing in claimant's favor—which is, after all, what "a preponderance" is, and what *Mullins* and the APA requires. But that is not what happened. Rather, relying on the Black Lung Benefit Act's oft-touted "remedial" and "humanitarian" purposes, bits and pieces of legislative history, the decision of this Court in *Transportation Management*, and the *Mullins* footnote reference to the Department of Labor's use of the true doubt rule, the court of appeals concluded that the true doubt rule was a valid variation of proof standards in a black lung case.

Freeman believes that the court of appeals' decision in this matter articulates an erroneous and fundamentally misguided view of the quantum of proof required under the Administrative Procedure Act—a view which, if accepted, would vitiate a central tenet of the APA and fundamentally alter the nature of administrative litigation before many agencies. It also underscores the significant conflict and confusion now existing regarding the requirements of Section 7(c) in general and what these requirements mean to claims brought under the BLBA in particular. It is thus a paradigmic situation for the intervention of this Court. Indeed, the need for the Supreme Court's involvement was cited by Circuit Judge Easterbrook to explain his failure to seek a vote on the suggestion of rehearing *en banc*: "Nothing our court could do would resolve the tensions in the Supreme Court's opinions or end the appellate discord about [whether the true doubt rule comports with the APA or the BLBA] . . . when our panel's decision is but a symptom of a more widespread problem, . . . we should let the case proceed to the only tribunal that can supply the cure." App. *infra*, B-5.

The court of appeals erred when it validated the use of the true doubt rule by the ALJ in adjudicating this claim under the Black Lung Benefits Act. The use of the true doubt rule in this case impermissibly allowed the claimant to prevail without having satisfied the APA's requirement that he prove entitlement by a preponderance of the evidence. Moreover, the court of appeals' decision, which permits the claimant to prevail through use of the interim presumption when the evidence on the presumption does not weigh in his favor, is contrary to the holding in *Mullins Coal*, 484 U.S. at 158-60, which requires that a claimant, in a black lung case involving the Section 727

regulations, establish entitlement to the interim presumption by a preponderance of the evidence.

In addition, the court of appeals' analysis of *Steadman v. SEC*, 450 U.S. 91 (1981), and *Transportation Management*, 462 U.S. 393 (1983), is erroneous. Contrary to the court of appeals' decision, *Steadman* more clearly can be read to hold that section 7(c), when read as a whole, requires that the claimant, in a proceeding subject to the APA, prove his case by a preponderance of the evidence. *Transportation Management*, on the other hand, only provided that the party asserting an affirmative defense in an APA proceeding prove the defense by a preponderance of the evidence.

Last, there exists now an irreconcilable conflict between the Seventh and Sixth Circuits and the Third Circuit with respect to the issue of whether the burden of persuasion in administrative hearings under the APA may be judicially assigned to the opposing party. The lower courts have acknowledged the conflict among their decisions, and therefore, there is little chance that this matter will be resolved without intervention by this Court. For these reasons, review is warranted at this time.

## II. The True Doubt Rule is Invalid Under the Administrative Procedure Act and Black Lung Benefits Act

20 C.F.R. §727.203(a) provides the mechanism under which a black lung claimant invokes the interim presumption for purposes of proving entitlement of benefits. The only medical criteria at issue in this case was a single chest x-ray, which had been interpreted on three occasions. Section 727.203(a)(1) provides that the interim presumption will be invoked when:

> "A chest roentgenogram (X-Ray), biopsy, or autopsy *establishes* the existence of pneumoconiosis" (Emphasis supplied).

The ALJ here found that the most qualified readers of the chest x-ray came to opposite conclusions on whether the chest x-ray "established the existence of pneumoconiosis." App. *infra*, D-2.

*Mullins Coal v. Director, OWCP*, 484 U.S. 135 (1987), a case construing the regulations in 20 C.F.R. Part 727, held that a claimant cannot "establish" the existence of pneumoconiosis under Sec. 727.203(a)(1) when he has only produced but one item of qualifying evidence. In addressing the burden of proof under Sec. 727.203, the court held that the interim presumptions require that the claimant establish entitlement under the preponderance of the evidence standard. *Mullins Coal*, 484 U.S. at 158-60.

Despite this enunciation from the court in *Mullins Coal* regarding the burden of proof in black lung adjudications under 20 C.F.R. Part 727, the court of appeals held that the Part 727 regulations did not assign the burden of persuasion, and that Section 7(c) of the APA assigned the claimant only a burden of production. Therefore, the court held, the use of the true doubt rule as a judicial construct in which to assign the burden of persuasion to the employer in a black lung hearing was not inconsistent with the APA. App. *infra*, A-9.

In *Steadman v. SEC*, 450 U.S. 91, 95-97 (1981), the Supreme Court ruled that Section 7(c) of the APA (5 U.S.C. Sec. 556(d)), specifically addressed the degree of proof which must be adduced by the proponent of a rule or order:

> "Where Congress has not prescribed the degree of proof which must be adduced by the proponent of a rule or order to carry its burden of persuasion in an administrative proceeding, this Court has felt at liberty to prescribe the standard . . . However, where Congress has spoken, we have deferred . . . [W]e conclude that Congress has spoken.

> Because [the securities laws] do not indicate which standard of proof governs . . . we turn to Sec. 5 of the Administrative Procedure Act . . . Section 5(b), 5 U.S.C. Sec. 554(c)(2), makes the provisions of Sec. 7, 5 U.S.C. Sec. 556, applicable to adjudicatory proceedings. The answer to the question presented in this case, therefore, turns on the proper construction of Sec. 7.
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> * * *
>
> The language and legislative history of Section 7(c) leads us to conclude, therefore, that Section 7(c) was intended to establish a standard of proof and the standard adopted is the traditional preponderance-of-the-evidence standard.

*Steadman*, 450 U.S. 95-97, 102.

Two years later, this Court issued its decision in *NLRB v. Transportation Management*, 462 U.S. 393 (1983) a case under the National Labor Relations Act. In *Transportation Management*, the NLRB carried its burden of proving, by a preponderance of the evidence, the elements of unlawful discrimination under NLRA §8(a)(3): adverse action and a forbidden motive. The employer asserted an affirmative defense, and the Board assigned the employer the burden of proving it. *Id.* at 403, n.7. This Court affirmed.

The court of appeals here cited to *Transportation Management* to justify its conclusion that the burden of persuasion could be judicially altered from the traditional preponderance standard reaffirmed in *Steadman*. However, there is less to *Transportation Management* than meets the eye, as a careful reading of that case shows it not to be inconsistent with *Steadman*—or traditional proof standards—at all. As *Steadman* notes, section 7(c) of the APA was designed to ensure that "the accepted standards of proof . . . are to govern in administrative

proceedings as they do in the courts of law and equity." *Steadman*, 450 U.S. at 101, n.21. (quotation omitted). The accepted standards of proof "applied in the courts" most often assign the burden of proving affirmative defenses to the party alleging them. Therefore, *Transportation Management* is not inconsistent with the earlier decision in *Steadman*.

In its briefs below, the Department of Labor proffered many reasons for the need for the true doubt rule. Primary among the reasons cited is the BLBA's humanitarian purpose, its legislative history, and the longstanding use of the rule by the BRB. However, none of these reasons advanced by the Department of Labor in its brief below can overcome the APA's rule against supersedure, which provides:

> "Except as otherwise required by law, requirements or privileges relating to evidence or procedure apply equally to agencies and persons. . . . Subsequent statute may not be held to supersede or modify this subchapter, . . . except to the extent that it does so expressly."

5 U.S.C. Sec. 559.

Accordingly, for the true doubt rule to have any legitimacy, there must be some express, statutory text in the BLBA which allows the courts to judicially assign the burden of persuasion onto the opponent of benefits, contrary to the APA's requirement that the proponent of an order prove his or her case by a preponderance of the evidence. No such statutory authorization exists here. As was aptly noted by Circuit Judge Easterbrook, "there is no reference to the true doubt rule or any facsimile" in the Act, although the BLBA contains many substantive and evidentiary rules favorable to the claimant. App. *infra*, B-4. Moreover, "[t]o deploy such a rule on the basis

of legislative benevolence that also accounts for the statutory presumptions is to count the magnanimous impulse twice." *Id.*

Freeman does not quarrel with the notion that there was a humanitarian purpose underlying enactment of the BLBA. However, once the claimant is granted the benefit of the triple presumption already codified in the §727 regulations,[6] the humanitarian purpose of the Act is effectuated in the manner and to the extent Congress intended. It is improper for administrative agencies and the courts to tinker further with the Congressionally-mandated proof requirements for establishing entitlement to benefits. "Congress intended that those long term miners who can show that they are truly diseased should have to prove no more. But if a miner is not actually suffering from the type of ailment with which Congress is concerned, there is no justification for presuming that the miner is entitled to benefits." *Mullins Coal v. OWCP*, 484 U.S. at 158. Use of the true doubt rule relieves the miner of showing, by a preponderance of the evidence, that the evidence establishes the existence of pneumoconiosis—contrary to the reasoning of *Mullins* and more critically, the intent of Congress.

The view espoused by the Third Circuit in *Greenwich Collieries*, and *Maher Terminals*, discussed *infra*, states the better position. There the court of appeals held that the claimant bears the burden of persuasion in the context of administrative hearings under the APA because

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[6] Invocation of the interim presumption under the Part 727 regulations establishes, subject to rebuttal, (1) the existence of pneumoconiosis; (2) that the pneumoconiosis resulted from coal mine employment; and (3) that the pneumoconiosis caused total disability. 20 C.F.R. §727.203(a).

to interpret the APA as assigning the burden of persuasion onto the employer, due to the fact that the evidence is in equipoise, would result in the entry of an award of benefits that is not supported by a preponderance of the evidence.

## III. There Exists an Irreconcilable Conflict Among Circuits on the Validity of the True Doubt Rule

To date, three circuit courts of appeal have addressed the true doubt rule, in the face of a claim that it is irreconcilable with the validity of the BLBA, *Mullins Coal*, and the mandates of the APA. The Third Circuit Court of Appeals, in *Greenwich Collieries*, engaged in a lengthy analysis of the true doubt rule, and its genesis, and concluded that is was invalid under the APA and unauthorized by any provision of the Black Lung Benefits Act.[7] In so doing, the Third Circuit panel expressly noted and rejected the holding of the Seventh Circuit in this case. It reaffirmed its conclusion soon thereafter in striking down use of the true doubt rule under the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. §§901-45 ("LHWCA") as well. *Maher Terminals v. Dir., Office of Wkrs. Comp.*, 992 F.2d 1277 (3rd Cir. 1993). In addition, a panel of the Sixth Circuit Court of Appeals has found the Seventh Circuit's reasoning on the validity of the true doubt rule persuasive. *Skukan v. Consolidation Coal Company*, 993 F.2d 1228 (6th Cir. 1993). Each of these decisions recognizes the conflict of among the circuits on the validity of the true doubt rule; it is unlikely

[7] Petitions for writs of *certiorari* have been filed with this Court in both *Maher* (Nos. 93-474, 93-666) and *Greenwich Collieries* (No. 93-744) and are currently pending before this Court.

that any of the courts will reevaluate their positions on the matter. Indisputably, intervention by this Court is necessary to resolve the conflict.

## IV. The Issues Presented are Significant and Require this Court's Resolution

The scope of the issue presented by the true doubt litigation is not limited to the context of administrative hearings conducted under the BLBA. The APA is a statute governing adjudications in numerous federal agencies. The Seventh Circuit's decision in the case blesses, in the guise of "humanitarianism", administrative repudiation of standards of proof and persuasion that are the cornerstones of civil litigation in this country. Particularly to the extent it seems to authorize a different set of "humanitarian" rules for administrative litigation in entitlement programs, the reasoning espoused in the judgment in this case could have wide-ranging impact. As a general matter such a rule could wreak havoc on time-honored civil evidentiary rules establishing that the party seeking the award must prove his or her case by a preponderance of the evidence. In Black Lung litigation in particular, it will result in awards of Black Lung benefits under circumstances where the claimants seeking such benefits have not proven by a preponderance of the evidence that they even suffer from the disease, much less are totally disabled by it. Humanitarian intent aside, this is hardly what Congress could have intended.

## CONCLUSION

The petition for a writ of *certiorari* should be granted.

Respectfully submitted,

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# APPENDICES

# APPENDIX A

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

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No. 92-1992

FREEMAN UNITED COAL MINING COMPANY,

*Petitioner,*

*v.*

OFFICE OF WORKERS' COMPENSATION PROGRAM and FAIRY DELL JONES, widow of DONALD L. JONES,

*Respondents.*

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Petition for Review of a Final Order
of the Benefits Review Board.
No. 90-BLA-820

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ARGUED FEBRUARY 3, 1993—DECIDED MARCH 4, 1993

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Before BAUER, *Chief Judge*, COFFEY, *Circuit Judge*, and ESCHBACH, *Senior Circuit Judge*.

PER CURIAM. Freeman United Coal Mining Company ("Freeman") petitions for review of a decision of the Benefits Review Board of the Department of Labor. The Board affirmed the decision of an administrative law judge ("ALJ") awarding respondent Donald L. Jones benefits under the Black Lung Benefits Act ("Act"), 30 U.S.C. §§ 901-945. For the reasons stated below, we deny Freeman's petition for review.

## I. BACKGROUND

The travails of this case through the Department of Labor and the court of appeals from 1978 through 1989 are presented at length in *Freeman United Coal Mining Co. v. Benefits Review Board*, 879 F.2d 245 (7th Cir. 1989). For the sake of brevity, only portions are repeated here. Donald L. Jones worked for Freeman as a coal miner for approximately forty-five years. Jones was sixty-one years old when he filed for benefits with the United States Department of Labor in October of 1978. He continued to work for several months after filing his claim, but he eventually retired in 1979. Jones died in November of 1981.

Prior to Jones's death the ALJ issued a decision denying him benefits under the Black Lung Benefits Act. The Benefits Review Board reversed, finding that the ALJ erred in failing to invoke the interim presumption under 20 C.F.R. § 727.203(a)(1)[1] in the presence of X-ray evidence showing the existence of pneumoconiosis, and that the ALJ improperly allowed a rereading of this X-ray to defeat this threshold showing, in violation of the regulations. On remand, the ALJ first issued two successive orders awarding benefits, but ultimately denied benefits. Jones appealed the denial to the Benefits Review Board. The Board considered the X-ray evidence, which consisted of three readings of a single X-ray of Jones's chest. It found the interim presumption invoked but not rebutted, reversed the ALJ's decision, and awarded benefits.

On review of the Board's decision, this court found that the Board had exceeded its scope of review by consider-

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[1] Section 727.203 of Title 20 of the Code of Federal Regulations states:

> (a) *Establishing interim presumption.* A miner who engaged in coal mine employment for at least 10 years will be presumed to be totally disabled due to pneumoconiosis . . . arising out of that employment, if one of the following medical requirements is met:
>
> (1) A chest roentgenogram (X-ray), biopsy, or autopsy establishes the existence of pneumoconiosis . . . .

ing the X-ray evidence *de novo*, rather than remanding the case to the ALJ to assess the evidence. *See Freeman United Coal*, 879 F.2d at 249. The court vacated the Board's decision and ordered the case remanded to the ALJ for further consideration of the X-ray evidence.

On remand, the ALJ weighed the three readings of the single X-ray of record. The readings of Drs. Brandon and Minetree were positive for pneumoconiosis; Dr. Rosenstein's reading was negative. The ALJ disregarded the positive reading by Dr. Minetree, who is a board-certified radiologist but not a "B" reader, in favor of the readings of Drs. Rosenstein and Brandon, both of whom are "B" readers and board-certified radiologists.[2] The ALJ reasoned that physicians "having both of those qualifications are more qualified than readers who only have one or the other of the qualifications." Left with "an equal number of readings by equally qualified readers" (the positive reading by Dr. Brandon and the negative reading by Dr. Rosenstein) the ALJ concluded that "true doubt" existed whether the X-ray was positive or negative for pneumoconiosis. Believing that the so-called "true doubt rule" required him to resolve the evidentiary doubt in Jones's favor, the ALJ found that Jones had established the presence of pneumoconiosis. Accordingly, the ALJ found the interim presumption of disability invoked. He then found that the record was insufficient to rebut the presumption, and awarded benefits to Jones.

The Board affirmed the award of benefits, holding that the ALJ properly resolved the conflict between the equal-

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[2] " 'B' readers are radiologists who have demonstrated their proficiency in assessing and classifying x-ray evidence of pneumoconiosis by successful completion of an examination conducted by or on behalf of the Department of Health & Human Services." *Consolidation Coal Co. v. Chubb*, 741 F.2d 968, 971 n.2 (7th Cir. 1984). The opinion of a "B" reader who is not certified at the "B" level may be accorded greater weight than the opinion of a reader who is not certified at the "B" level. *See Freeman United Coal*, 879 F.2d at 246-47 n.2.

ly probative X-ray readings in Jones's favor, and properly found that the interim presumption was invoked and not rebutted. Freeman appealed.

## II. DISCUSSION

Although this is an appeal from the decision of the Benefits Review Board, this court actually reviews the decision of the ALJ, asking whether it is supported by substantial evidence, is in accord with the law, and is rational. *Amax Coal Co. v. Beasley*, 957 F.2d 324, 327 (7th Cir. 1992). Freeman's contention is that the ALJ's decision to award benefits to Jones is not in accordance with the law. Specifically, Freeman asserts that the linchpin in the ALJ's decision, the true doubt rule, is at odds with section 7(c) of the Administrative Procedure Act ("APA") because the rule allows an ALJ to award black lung benefits to a claimant who has not proven his right to them by a preponderance of the evidence.[3]

Freeman's appeal is not easy to understand without understanding the interplay between the true doubt rule and the rebuttable presumption of disability that is condition-

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[3] Jones contends that Freeman has waived this issue by failing to raise it below. Ordinarily an appellate court will refuse to consider questions not presented in administrative proceedings. *Hormel v. Helvering*, 312 U.S. 552, 556 (1941); *Myron v. Chicoine*, 678 F.2d 727, 731 (1982). "Simple fairness to those who are engaged in the tasks of administration, and to litigants, requires as a general rule that courts should not topple over administrative decisions unless the administrative body not only has erred but has erred against objection made at the time appropriate under its practice." *United States v. L.A. Tucker Truck Lines, Inc.*, 344 U.S. 33, 37 (1952).

Freeman maintains that it has not waived its claim that the true doubt rule violates section 7(c) of the APA because it objected when the ALJ invoked the rule, and continued to question its soundness on appeal to the Board. Freeman's is the better position. This is not a case where an administrative adjudication is necessary to develop the factual record. The issue on appeal is purely legal and, as such, is subject to review *de novo*. *Director, OWCP v. Midland Coal Co.*, 855 F.2d 509, 511 (7th Cir. 1988).

ally granted to claimants in black lung adjudications. To make out a claim for black lung benefits, a miner must establish: (1) total disability, (2) caused at least in part by pneumoconiosis, (3) that arose out of employment in a coal mine. *See Mullins Coal Co. v. Director, OWCP*, 484 U.S. 135, 141 (1987). These three elements are presumed, so far as bears on this case, if the claimant has ten years of qualifying experience in a coal mine and produces a chest X-ray that establishes the existence of pneumoconiosis. 20 C.F.R. § 727.203(a)-(a)(1).[4] There is one caveat, however, which turns out to be important in this case. The claimant cannot invoke the presumption by producing an X-ray that simply constitutes evidence of the presence of pneumoconiosis. *Mullins Coal*, 484 U.S. at 147; *Cook v. Director, OWCP*, 816 F.2d 1182, 1185 (7th Cir. 1987). The chest X-ray produced by the claimant must show the presence of pneumoconiosis by a preponderance of the evidence. *Mullins Coal*, 484 U.S. at 147-52. The effect of the presumption is to shift both the burden of production and of persuasion to the employer. *Amax Coal Co. v. Director, OWCP*, 772 F.2d 304, 305 (7th Cir. 1985); *Peabody Coal Co. v. Hale*, 771 F.2d 246, 248 n.2 (7th Cir. 1985). *But see Underhill v. Peabody Coal Co.*, 687 F.2d 217, 222 (7th Cir. 1982) (holding, without extended discussion, that the presumption shifts only the burden of production). The presumption may be rebutted by showing that the claimant does not, or did not, have pneumoconiosis. 20 C.F.R. § 727.203(b).

The true doubt rule is a judicial construct designed to effectuate Congress's intent that the Black Lung Benefits Act be liberally construed to ensure payment to deserv-

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[4] The Secretary of Labor was authorized to create the presumption of disability by statute, 30 U.S.C. § 921(c). In comments accompanying the publication of 20 C.F.R. § 727.203 the Secretary stated, "[T]he Act embodies the principle that doubt is to be resolved in favor of the claimant, and that principle plays an important role in claims determinations both under the interim presumption and otherwise." 43 Fed. Reg. 36,826 (1978).

ing claimants. The rule derives from a Senate Report accompanying 1972 amendments to the black lung program which noted that the Act "is intended to be a remedial law . . . . In the absence of definitive medical conclusions there is a clear need to resolve doubts in favor of the disabled miner or his survivors." S. Rep. No. 743, 92d Cong., 2d Sess. (1972), *reprinted in* 1972 U.S.C.C.A.N. 2305, 2315. Congress reaffirmed its expressed intent that the benefit of any evidentiary doubt be given to the miner when it further amended the Act in 1977.[5]

Many courts have harvested this language from the Senate Report in formulating the rule that, when equally probative but contradictory evidence is presented in the record and selection of one set of facts results in a finding for the claimant and the other leads to a finding against the claimant, the evidence must be resolved in favor of the claimant. *See, e.g., Adkins v. Director, OWCP*, 958 F.2d 49, 52 n.4 (4th Cir. 1992); *Bosco v. Twin Pines Coal Co.*, 892 F.2d 1473, 1476 (10th Cir. 1989); *Stomps v. Director, OWCP*, 816 F.2d 1533, 1534-35 (11th Cir. 1987); *Ware v. Director, OWCP*, 814 F.2d 514, 517 (8th Cir. 1987); *Haywood v. Secretary of Health & Human Svcs.*, 699 F.2d 277, 281 n.7 (6th Cir. 1983). This court too has endorsed the true doubt rule as a means of breaking evidentiary gridlock in black lung cases. *See Freeman United Coal*, 879 F.2d at 249; *Collins v. Old Ben Coal Co.*, 861 F.2d 481, 489-90 (7th Cir. 1988); *Peabody Coal Co. v. Direc-*

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[5] The Senate Human Resources Committee said:

> In 1972, the Committee stressed that, in interpreting the amendments, the miner should have the benefit of any doubt. The Committee underscores and reaffirms this position taken in 1972 with respect to the 1977 amendments, and specifically in this context, expresses its expectation that the Secretary of Labor will promulgate standards which give the benefit of any doubt to the coal miner.

S. Rep. No. 209, 95th Cong., 1st Sess. (1977), *reprinted in* House Comm. on Education and Labor, 96th Cong., Legislative History of the Black Lung Benefits Reform Act and Black Lung Benefits Revenue Act of 1977 at 616 (1979).

*tor, OWCP*, 778 F.2d 358, 362 (7th Cir. 1985). When it is applied, the rule ensures that the employer will prevent invocation of the presumption only when its evidence is stronger than the claimant's.

Jones enjoyed the benefit of the true doubt rule in this case. The ALJ found that the X-ray evidence supporting and opposing Jones's claim for benefits was in equipoise. Were it not for the true doubt rule, Jones might have failed to invoke the presumption of disability, for if there are conflicting readings of the same X-ray the fact that one of them is positive does not necessarily establish the presumption. *Cook*, 816 F.2d at 1185. That is certainly true in this case since Jones's positive reading was countered by an equally probative negative reading. The true doubt rule revived Jones's claim by giving his evidence the benefit of the evidentiary doubt. Hence Jones's X-ray, which was insufficient to establish the presence of pneumoconiosis by itself, became probative enough to invoke the presumption of disability and place the onus on Freeman to persuade the ALJ that Jones did not have pneumoconiosis. *See* 20 C.F.R. § 727.203(b)(4); *Amax Coal Co. v. Director, OWCP*, 772 F.2d 304, 305 (7th Cir. 1985). The ALJ concluded that Freeman had failed to rebut the presumption, and therefore Jones was entitled to benefits.

Whether it is permissible under the APA for the true doubt rule to facilitate Jones's claim in the above-described manner is the crux of Freeman's appeal.[6] Section 7(c) of

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[6] Unquestionably, the APA applies to black lung adjudications. Section 422(c) of the Black Lung Benefits Act, 30 U.S.C. § 932(a), incorporates section 19(d) of the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. § 919(d), which in turn requires that any hearing under the Longshore Act be conducted in accordance with section 5 of the APA, 5 U.S.C. § 554. By regulation, the Secretary of Labor has provided that, in black lung adjudications, "hearings shall be conducted in accordance with the provisions of 5 U.S.C. 554 et seq." 20 C.F.R. § 725.452(a). Section 554(c)(2) says that where parties are unable to determine a controversy by consent, they are entitled to a "hearing and decision . . . in accordance with sections 556 and 557 of this title."

the APA, 5 U.S.C. § 556(d), says that "[e]xcept as otherwise provided by statute, the proponent of a rule or order has the burden of proof." This burden clearly falls on Jones, the claimant who is seeking black lung benefits. To avoid conflicting with the APA, then, the true doubt rule may not relieve Jones of his "burden of proof," as that term is used in the statute.

The APA does not explain what is meant by the term "burden of proof." It might be that the proponent must satisfy a burden of persuasion; however, it is equally conceivable that the proponent need only satisfy a burden of going forward. The Supreme Court has resolved this ambiguity. "Burden of proof" as that term is used in the APA means the burden of going forward, not the burden of persuasion. *NLRB v. Transportation Management Corp.*, 462 U.S. 393, 404 (1983). Thus, if the effect of the true doubt rule is to relieve a claimant of his burden of going forward, it violates section 7(c) of the APA.

The true doubt rule does not alleviate the claimant's burden of going forward. Before a claimant can benefit from the rule, he must put in some evidence showing the presence of pneumoconiosis. Section 7(c) of the APA requires no more. Jones satisfied his burden of going forward by producing an X-ray from which the presence of pneumoconiosis could reasonably be inferred. *See* CHARLES T. MCCORMICK, MCCORMICK ON EVIDENCE, § 338, at 433 (John William Strong ed., 4th ed. 1992). That Freeman was able to counter this evidence with equally probative evidence is of no consequence to Jones's burden of going forward. Jones satisfied his burden by producing prima facie evidence of pneumoconiosis.

Freeman also contends that application of the true doubt rule impermissibly lowers the standard of proof required by the APA. The relevant portion of section 7(c) of the APA states that no rule or order may be issued unless it is "supported by and in accordance with . . . reliable, probative, and substantial evidence." 5 U.S.C. § 556(d). The Supreme Court has held that this section establishes

a preponderance-of-the-evidence standard of proof on the proponent of a rule or order. *Steadman v. SEC*, 450 U.S. 91, 100-01 (1981). Freeman argues that by allowing a claimant to receive the benefit of a presumption of disability without first proving his entitlement to it by a preponderance of the evidence, the true doubt rule runs afoul of section 7(c). Freeman is wrong.

As noted earlier, section 7(c) mandates only that the burden of going forward, not the burden of persuasion, be placed on the claimant. The burden of persuasion may be legislatively or judicially assigned to a specific party to establish a particular fact. *Transportation Management*, 462 U.S. at 403 n.7; *Alabama By-Prods. Corp. v. Killingsworth*, 733 F.2d 1511, 1514 (11th Cir. 1984). When it is applied, the true doubt rule allows an ALJ to invoke the presumption of disability in favor of a claimant once the claimant has produced prima facie evidence of pneumoconiosis that has not been overcome by the employer's opposing evidence. The employer then must persuade the ALJ that the claimant did not have pneumoconiosis. The rule does not contravene section 7(c), for its application results in nothing more than a judicial assignment of the burden of persuasion to the employer.

At first blush, the Supreme Court's decision in *Mullins Coal*, 484 U.S. 135 (1987), would appear to cast some doubt on the validity of the true doubt rule. The question before the Court in *Mullins Coal* was whether one item of evidence qualifying a claimant for the presumption is always sufficient to invoke it. The Court answered in the negative, interpreting 20 C.F.R. § 727.203(a)(1) to require a claimant to prove at least one of the qualifying facts by a preponderance of the evidence.

Nevertheless, the Court left the true doubt rule intact. In its opinion the Court quoted at length from the comments that accompanied the publication of the regulations in which the Secretary stated, "The [Black Lung Benefits] Act embodies the principle that doubt is to be resolved in favor of the claimant, and that principle plays an im-

portant role in claims determinations both under the interim presumption and otherwise." *Mullins Coal*, 484 U.S. at 156 n.29 (quoting 43 Fed. Reg. 36,826 (1978)). Earlier in its opinion, the Court addressed the true doubt rule directly, noting that the Benefits Review Board " 'has consistently upheld the principle that, where true doubt exists, that doubt shall be resolved in favor of the claimant.' " *Id.* at 144 n.12 (quoting *Lessar v. C.F. & I. Steel Corp.*, 3 Ben. Rev. Bd. Serv. (MB) 1-63, 1-68 (Black Lung 1981)). Far from casting doubt on the true doubt rule, the above language treats the rule as a reasonable interpretation of the regulations.

## III. CONCLUSION

The true doubt rule is not inconsistent with the APA and was appropriately applied in this case. The ALJ correctly concluded that Jones was entitled to benefits. Freeman's petition for review of the Benefit Review Board's decision therefore is DENIED.

A true Copy:

Teste:

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*Clerk of the United States Court of Appeals for the Seventh Circuit*

# APPENDIX B

## IN THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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No. 92-1992

FREEMAN UNITED COAL MINING COMPANY,

*Petitioner,*

*v.*

OFFICE OF WORKERS' COMPENSATION PROGRAM and FAIRY DELL JONES, widow of DONALD L. JONES,

*Respondents.*

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On Petition for Rehearing.

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DECIDED AUGUST 4, 1993

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Before BAUER, *Chief Judge*, COFFEY, *Circuit Judge*, and ESCHBACH, *Senior Circuit Judge*.

PER CURIAM. Petitioner filed a petition for rehearing and suggestion of rehearing in banc on April 5, 1993. No judge in regular active service has requested a vote on the suggestion of rehearing in banc, and all of the judges on the panel have voted to deny rehearing. The petition for rehearing is therefore DENIED.

Statement of EASTERBROOK, *Circuit Judge*, with whom POSNER, *Circuit Judge*, joins, respecting the suggestion of rehearing in banc. The federal government has directed a coal mine operator to pay a substantial sum to the widow of a deceased miner, even though neither the administrative law judge nor the Benefits Review Board was willing

to say that a preponderance of the evidence establishes that the miner suffered from pneumoconiosis. Declaring the evidence balanced, the ALJ and BRB applied the Board's "true doubt rule," under which claimants prevail in all close cases. The rule functions as a presumption of black lung disease, which the employer may rebut only by mustering a preponderance of the evidence to show that a claimant does not have pneumoconiosis. A panel of this court held that the true doubt rule is consistent with both the Black Lung Benefits Act and the Administrative Procedure Act. 988 F.2d 706 (1993). Other courts of appeals have reached the same conclusion. E.g., *Skukan v. Consolidation Coal Co.*, 993 F.2d 1228 (6th Cir. 1993) (concluding that the ALJ and BRB erred in *not* applying the true doubt rule to award benefits); *Adkins v. Director, OWCP*, 958 F.2d 49, 52 n.4 (4th Cir. 1992). But the third circuit has held that the true doubt rule is neither appropriate under the Black Lung Benefits Act nor permissible under §7(c) of the APA, 5 U.S.C. §556(d). *Greenwich Collieries v. Director, OWCP*, 990 F.2d 730 (1993) (Black Lung Benefits Act); *Maher Terminals, Inc. v. Director, OWCP*, 992 F.2d 1277 (1993) (APA). Both *Greenwich* and *Maher* disagreed with our panel's disposition of this case, while *Skukan* found the panel's opinion persuasive.

Decision according to the preponderance of the evidence is the norm in civil litigation, including administrative adjudication under the APA. *Steadman v. SEC*, 450 U.S. 91 (1981). When the evidence is in equipoise, the party needing to establish a proposition loses. The Supreme Court recently used this standard in a black lung case, stating that applicable regulations require no less. *Mullins Coal Co. v. Director, OWCP*, 484 U.S. 135, 158-60 (1987). The Black Lung Benefits Act is a humanitarian statute, containing a slew of presumptions favorable to claimants. To obtain the benefit of these presumptions, however, the miner must establish that he suffers from coal workers' pneumoconiosis. "[I]f a miner is not actually suffering from the type of ailment with which Congress was concerned, there is no justification for presuming that that miner is entitled to benefits." *Id.* at 158.

According to our panel, the true doubt rule "derives from a Senate Report accompanying the 1972 amendments to the black lung program which noted that the Act 'is intended to be a remedial law . . . . In the absence of definitive medical conclusions there is a clear need to resolve doubts in favor of the disabled miner or his survivors.' " S. Rep. 92-743, 92d Cong., 2d Sess. (1972), quoted in 988 F.2d at 710. Of course, rules of law do not come from legislative reports. They come from statutes. Legislative history may on occasion be useful in interpreting ambiguous statutory language, but neither the panel nor the BRB identified any text that this snippet might help decode. See *Lincoln v. Vigil*, 113 S. Ct. 2024, 2031-32 (1993) (legislative history divorced from statutory text has no significance); *Puerto Rico Department of Consumer Affairs v. Isla Petroleum Corp.*, 485 U.S. 495 (1988) (same). The Committee Report stated the philosophy of the legislation, explaining why Congress chose to use presumptions. One presumption adopted at the time is that anyone who worked in the mines for 10 years and had a respiratory disease was afflicted with pneumoconiosis. See *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1 (1976) (describing the elaborate presumptions in the 1972 amendments). Another presumption, still in the statute, is that complicated pneumoconiosis is totally disabling. 30 U.S.C. §921(c)(3). These and other presumptions made the program so generous to miners that Congress retrenched; claims filed after January 1, 1982, must satisfy a higher standard. *Pittston Coal Group v. Sebben*, 488 U.S. 105 (1988), and *Pauley v. Bethenergy Mines, Inc.*, 111 S. Ct. 2524 (1991), describe many of these changes.

Knowing that Congress meant to be generous with mine operators' money does not tell us *how* generous. Legislative history frequently points in a direction, but to carry out the statute we must identify not only the direction but also the distance. "[N]o legislation pursues its purposes at all costs. Deciding what competing values will or will not be sacrificed to the achievement of a particular objective is the very essence of legislative choice—and it

frustrates rather than effectuates legislative intent simplistically to assume that *whatever* furthers the statute's primary objective must be the law." *Rodriguez v. United States*, 480 U.S. 522, 525-26 (1987) (emphasis in original); *Pension Benefit Guaranty Corp. v. LTV Corp.*, 496 U.S. 633, 646-47 (1990) (quoting *Rodriguez*). See also *Board of Governors v. Dimension Financial Corp.*, 474 U.S. 361, 374 (1986); *NAACP v. American Family Mutual Insurance Co.*, 978 F.2d 287, 298 (7th Cir. 1992); *In re Erickson*, 815 F.2d 1090, 1094 (7th Cir. 1987). To find rules of law we must consult the statutory text. The Black Lung Benefits Act contains many substantive and evidentiary rules favorable to claimants, but no true doubt rule or any facsimile. To deploy such a rule on the basis of legislative benevolence that also accounts for the statutory presumptions is to count the magnanimous impulse twice. Tilting the burdens in miners' favor is especially questionable for claims filed in 1982 and later, for the potent presumptions that the Senate Report of 1972 sought to justify have vanished. The Benefits Review Board announced in 1978 that a true doubt rule would be employed to decide black lung cases, *Provance v. United States Steel Corp.*, 1 Black Lung Rep. 1-483 (BRB 1978), but did not use it often for pre-1982 claims. See *Mullins*, 484 U.S. at 163 n.2 (Marshall, J., dissenting) ("The Director has failed to bring to our attention . . . [even] one instance in which the true-doubt rule actually has been applied by an ALJ in evaluating a miner's claim."). In recent years the rule has become ubiquitous and has on occasion been applied to pre-1982 claims, as in this case. Can it be that the Board has set out to strengthen the presumptions for pre-1982 claims and to re-create them for later ones, overriding the contrary judgment of Congress?

*Mullins* offered the Supreme Court an opportunity to decide whether the true doubt rule comports with the APA and the Black Lung Benefits Act. The Court ducked. 484 U.S. at 161 n.35. Although some of the Court's cases, such as *Steadman*, say that §7(c) of the APA creates a preponderance standard, other cases, such as *NLRB v.*

*Transportation Management Corp.*, 462 U.S. 393, 403 n.7 (1983), say that an agency may change the assignment of burdens on at least some issues in a case. Cf. *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989). Nothing our court could do would resolve the tension in the Supreme Court's opinions or end the appellate discord about the true doubt rule. Problems of our own making should be cleared up locally. When our panel's decision is but a symptom of a more widespread problem, however, we should let the case proceed to the only tribunal that can supply the cure. I have accordingly not called for a vote on the suggestion of rehearing in banc.

A true Copy:

Teste:

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*Clerk of the United States Court of Appeals for the Seventh Circuit*

# APPENDIX C

**BENEFITS REVIEW BOARD**

**BRB No. 90-820 BLA**
**OWCP No. 342-03-2658**

DONALD L. JONES
Claimant-Respondent

v.

FREEMAN UNITED COAL MINING COMPANY
Employer-Petitioner

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR
Party-In-Interest

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DECISION AND ORDER
ISSUED MARCH 20, 1992

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Appeal of the Supplemental Decision and Order of Charles P. Rippey, Administrative Law Judge, United States Department of Labor.

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Before BROWN and McGRANERY, Administrative Appeals Judges, and BONFANTI, Administrative Law Judge.*

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* Sitting as a temporary board member by designation pursuant to the Longshore and Harbor Workers' Compensation Act, as amended in 1984, 33 U.S.C. §921(b)(5) (Supp. V 1987).

Harold B. Culley, Raleigh, Illinois for claimant; Louis D. Bernstein (Gould & Ratner), Chicago, Illinois, for employer.

PER CURIAM:

Employer appeals the Supplemental Decision and Order (86-BLA-4794) of Administrative Law Judge Charles P. Rippey awarding benefits on a miner's claim filed pursuant to the provisions of Title IV of the Federal Coal Mine Health and Safety Act of 1969, as amended, 30 U.S.C. §901 *et seq.* (the Act). This case has been before the Board previously.[1] In its most recent decision regarding this claim, the Board determined that the administrative law judge erred in excluding an x-ray reading from consideration under 20 C.F.R. §727.203(a) and held that the x-ray evidence was sufficient to establish invocation of the interim presumption pursuant to Section 727.203(a)(1). *Jones v. Freeman United Coal Mining Co.*, BRB No. 83-984 BLA (Mar. 30, 1988) (unpublished). The Board remanded the case to the deputy commissioner for an award of benefits.

Employer filed a Petition for Review with the United States Court of Appeals for the Seventh Circuit. The Seventh Circuit affirmed the Board's determination regarding the admission of the x-ray reading but vacated the Board's Decision and Order, holding that the Board acted improperly in making a finding of fact with respect to the x-ray evidence. The court remanded the case to

[1] This is the third time this case has been before the Board. In *Jones v. Freeman United Coal Co.*, BRB No. 80-611 BLA (May 19, 1981) (unpublished), the Board vacated the administrative law judge's Decision and Order denying benefits and remanded the case to the administrative law judge with instructions to open the record to permit development of the x-ray evidence.

the administrative law judge with instruction to reconsider the x-ray evidence in light of the United States Supreme Court's decision in *Mullins Coal Co., Inc. of Virginia v. Director, OWCP*, 108 S.Ct. 427, 11 BLR 2-1 (1987), *reh'g denied*, 108 S.Ct. 787 (1988) and to provide a rationale for his finding. *Freeman v. Benefits Review Board*, No. 88-2209 (7th Cir. 1989). The administrative law judge applied the true doubt rule and determined that the x-ray interpretations established invocation of the interim presumption. The administrative law judge further found that the interim presumption was not rebutted under 20 C.F.R. §727.203(b). Accordingly, benefits were awarded. Employer argues on appeal that the administrative law judge erred in applying the true doubt rule when weighing the x-ray evidence. Claimant responds, urging affirmance of the administrative law judge's Decision and Order awarding benefits. The Director, Office of Workers' Compensation Programs, has not filed a brief in this appeal.

The Board's scope of review is defined by statute. If the administrative law judge's findings of fact and conclusions of law are supported by substantial evidence, are rational, and are consistent with applicable law, they are binding upon this Board and may not be disturbed. 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

The relevant x-ray evidence consists of three readings of a film dated January 21, 1979. The administrative law judge noted that two of the physicians who interpreted the film, Drs. Brandon and Rosenstein, were board certified radiologists and B-readers while Dr. Minetree was a board certified radiologist. The administrative law judge stated that he would disregard Dr. Minetree's positive

reading on the grounds that he was not as qualified as Drs. Brandon and Rosenstein. Supplemental Decision and Order at 2. The administrative law judge then determined that because Dr. Rosenstein read the film as negative and Dr. Brandon read it as positive, true doubt existed as to whether the film established the existence of pneumoconiosis which the administrative law judge was required to resolve in claimant's favor. Accordingly, the administrative law judge determined that claimant established invocation of the interim presumption under Section 727.203(a)(1). Supplemental Decision and Order at 2.

Employer contends that the administrative law judge improperly applied the true doubt rule in the instant case. Employer argues specifically that the rule cannot be used to relieve claimant of his burden of proving all elements of his claim. Employer also asserts that application of the rule is limited to situations in which definitive medical conclusions are absent with respect to all of the elements of entitlement and selection of one set of facts will resolve the issue of entitlement in claimant's favor while selection of another set of facts will result in a denial of benefits.

These contentions are without merit. Employer is correct in noting that claimant generally bears the burden of proving the requisite elements of entitlement including any facts precedent to the invocation of the interim presumption set forth in Section 727.203(a). *See Mullins, supra*; *Peabody Coal Co. v. Director, OWCP*, 778 F.2d 358, 8 BLR 2-84 (7th Cir. 1985); *Burt v. Director, OWCP*, 7 BLR 1-197 (1984). However, the United States Court of Appeals for the Seventh Circuit and the Board have consistently recognized that in light of the remedial purpose of the Act, whenever there is equally probative but

contradictory evidence with respect to a particular issue of element of entitlement, all doubts must be resolved in favor of claimant. *See Collins v. Old Ben Coal Co.*, 861 F.2d 981 (7th Cir. 1988); *Old Ben Coal Co. v. Luker*, 826 F.2d 688, 10 BLR 2-249 (7th Cir. 1987); *Old Ben Coal Co. v. Director, OWCP [Prewitt]*, 755 F.2d 588 (7th Cir. 1985); *Wilt v. Wolverine Mining Co.*, 14 BLR 1-70 (1990); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989) (*en banc*); *Conley v. Roberts and Schaefer Co.*, 7 BLR 1-309 (1984). In addition, although the rule is often stated in terms of selection of a particular set of facts resolving the *case* either for or against claimant, *see e.g. Roberts v. Bethlehem Mines Corp.*, 8 BLR 1-211 (1985); *Conley, supra*, in application, the rule has been used to resolve doubt regarding specific issues and elements of entitlement without regard to whether use of the rule is ultimately dispositive of the claim. This includes consideration of whether the x-ray interpretations of record are sufficient to establish the existence of pneumoconiosis. *See Wilt, supra*; *Clark, supra.*

Finally, we note that under the regulations set forth in 20 C.F.R. Part 727, the administrative law judge is not required to weigh the evidence pertaining to all of the methods of invocation together to determine whether invocation has been established, but rather, the administrative law judge must weigh like-kind evidence in the context of the invocation method to which it is relevant. *See Mullins, supra.* Thus, the fact that the blood gas studies and medical reports of record militate against invocation is of no significance. Because the administrative law judge applied the true doubt rule properly, we hereby

affirm his finding that claimant established invocation of the interim presumption under Section 727.203(a)(1).[2]

Accordingly, the Supplemental Decision and Order of the administrative law judge awarding benefits is affirmed.

SO ORDERED.

/s/ JAMES F. BROWN
Administrative Appeals Judge

/s/ REGINA C. McGRANERY
Administrative Appeals Judge

/s/ RENO E. BONFANTI
Administrative Law Judge

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[2] Employer has also suggested that there is evidence in the record which is sufficient to establish rebuttal under 20 C.F.R. §727.203(b). We hereby affirm the administrative law judge's no rebuttal finding, as employer has not identified any specific errors of fact or law with respect to this finding. *See Sarf v. Director, OWCP*, 10 BLR 1-119 (1987); *Fish v. Director, OWCP*, 6 BLR 1-107 (1983).

In addition, claimant contends that the administrative law judge erred in rejecting Dr. Brandon's positive x-ray interpretation because he was not a B-reader. In light of our affirmance of the finding of invocation at 20 C.F.R. §727.203(a), this error, if any, is harmless. *See Johnson v. Jeddo-Highland Coal Co.*, 12 BLR 1-53 (1988); *Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

# APPENDIX D

## OFFICE OF ADMINISTRATIVE LAW JUDGES
## CASE NO.: 86-BLA-4794

DONALD L. JONES

Claimant

v.

FREEMAN UNITED COAL MINING COMPANY

Respondent

and

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS

Party-In-Interest

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SUPPLEMENTAL DECISION AND ORDER UPON REMAND FROM THE SEVENTH CIRCUIT COURT OF APPEALS.

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Decided January 19, 1990

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Before CHARLES P. RIPPEY, Administrative Law Judge

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Harold B. Culley, Jr., for claimant; Louis D. Bernstein (Gould & Ratner), Chicago, Illinois, for employer; James B. Leonard, for the Party-in-Interest.

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On June 28, 1989, the United States Court of Appeals for the Seventh Circuit affirmed Benefit Review Board's decision that the x-ray reading of Dr. Brent Brandon

should not have been excluded, but ruled that the Board exceeded its jurisdiction in going on to reweigh the evidence with the inclusion of the Brandon reading. The Court, therefore, remanded the case to me, directing a reweighing of the evidence including the Brandon reading. The Board transmitted to me the file in this case on November 1, 1989.

Involved here are three readings of a single x-ray film taken on January 21, 1979. Two of the readers, Drs. Brandon and Rosenstein are both Certified B Readers and Board Certified Radiologists. The third reader, Dr. Minetree, is a Board Certified Radiologist, but he is not a B Reader. Readers having both of those qualifications are more qualified than readers who only have one or the other of the qualifications. Therefore, I will disregard the reading by Dr. Minetree since he is not as qualified as either Dr. Rosenstein or Dr. Brandon.

Dr. Brandon found that the film was positive for pneumoconiosis and Dr. Rosenstein found that it was negative. This equal number of readings by equally qualified readers, on either side of the question creates a situation where the evidence is equally balanced and there is true doubt regarding the factual finding as to whether or not the x-ray film taken on January 21, 1979 is or is not positive for pneumoconiosis.

This doubt must be resolved in favor of the Claimant. Thus, the x-ray evidence which must now be weighed in this case does support a finding that it is positive for pneumoconiosis. The interim presumption at Sec. 727.203 of the regulations has been invoked.

There is no evidence in this record that would support a finding that the interim presumption has been rebutted

in any of the ways provided in Sec. 727.203(b) of the regulations.

The Claimant is entitled to benefits under the Act, and for purposes of augmentation he has one dependent: namely his wife, Fairy Dell. The Claimant died on November 3, 1981.

## ORDER

The Freeman United Coal Company is ordered to pay to the Claimant's widow, or the Black Lung Disability Trust Fund, as their interests may appear:

1. All benefits under the Act, including medical benefits, augmented by virtue of his one dependent described above from January, 1979 through October, 1981.

2. All periodic benefits under the Act, without augmentation, due to the survivorship of his widow from November, 1981 and continuing.

3. All interest on unpaid benefits from the date each benefit was due until the date of actual payment, at the rate or rates prescribed by law.

4. All amounts payable by their terms to the Claimant prior to his death shall be payable to his widow. The Trust Fund shall be reimbursed for all amounts that it has paid to the Claimant or his widow. All interest on amounts paid by the Trust Fund shall be payable to the Trust Fund commencing with the date of the Trust Fund's payment.

/s/ CHARLES P. RIPPEY
Administrative Law Judge
Phone 202-653-5120

*NOTICE OF APPEAL RIGHTS.* Any party dissatisfied with this Decision and Order may appeal it to the Benefits Review Board within 30 days from the date of this Decision, by filing a Notice of Appeal with the Benefits Review Board, 1111 20th Street, N.W., Suite 757, Washington, D.C. 20036. (20 C.F.R. 725.481) A copy of the notice of appeal must also be served on Donald S. Shire, Esq., Associate Solicitor for Black Lung Benefits. His address is Francis Perkins Building, Room N-2605, 200 Constitution Ave., N.W., Washington, D.C. 20210.

# APPENDIX E

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

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No. 88-2009

FREEMAN UNITED COAL MINING COMPANY,

*Petitioner,*

*v.*

BENEFITS REVIEW BOARD, UNITED STATES DEPARTMENT OF LABOR, DONALD L. JONES, AND DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS,

*Respondents.*

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Petition for Review of a Decision and Order
of the Benefits Review Board,
United States Department of Labor
No. 83-984-BLA

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ARGUED JUNE 13, 1989—DECIDED JUNE 28, 1989

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Before BAUER, *Chief Judge,* CUMMINGS, *Circuit Judge,* and ESCHBACH, *Senior Circuit Judge.*

ESCHBACH, *Senior Circuit Judge.* Freeman United Coal Mining Company petitions for review of a decision of the Benefits Review Board of the Department of Labor. The Board reversed the decision of an administrative law judge (ALJ) denying respondent Donald L. Jones benefits under the Black Lung Benefits Act, 30 U.S.C. § 901 *et seq.* We reverse the Board's decision and remand to the ALJ for further proceedings consistent with this court's order.

I.

Donald L. Jones worked for Freeman United Coal Mining Company as a coal miner for approximately forty-five years. Jones was sixty-one years old when he filed for black lung benefits with the United States Department of Labor on October 27, 1978. Jones continued to work for several months after filing his claim, but he eventually retired in 1979. Jones died on November 3, 1981.

Prior to Jones' death the ALJ issued a decision denying Jones benefits under the Act. The Benefits Review Board reversed, finding that the ALJ failed to invoke the interim presumption under 20 C.F.R. § 727.203(a)(1)[1] in the presence of x-ray evidence that showed the existence of pneumoconiosis and the ALJ also improperly allowed a rereading of this x-ray to defeat this threshold showing, in violation of the regulations. The Board remanded the case to the ALJ for reconsideration and for the purpose of allowing the parties to submit additional x-ray evidence if they desired. The ALJ reopened the record to allow additional submissions and granted the parties an extension of time until September 1981 for this purpose. In October 1981, the ALJ issued a supplemental decision in which he determined that the interim presumption was invoked and Freeman had failed to submit any rebuttal evidence. When Freeman advised the ALJ that the ALJ had given the parties until September to submit

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[1] Section 727.203 of Title 20 of the Code of Federal Regulations states:

(a) Establishing Interim Presumption. A miner who engaged in coal mine employment for at least 10 years will be presumed to be totally disabled due to pneumoconiosis, . . . arising out of that employment, if one of the following medical requirements is met:

(1) A chest roentgenogram (x-ray), biopsy, or autopsy establishes the existence of pneumoconiosis . . . ;

(2) Ventilatory studies establish the presence of a chronic respiratory or pulmonary disease . . . ;

additional evidence and that Freeman did submit x-ray evidence in August suggesting that Jones did not have pneumoconiosis, the ALJ suspended his October order until such time that he reviewed this additional evidence.

Jones also submitted additional x-ray evidence in November 1981. Thus, the ALJ had three readings of a single x-ray before him: a negative reading for pneumoconiosis by Dr. Rosenstein (a "B" reader[2]); a positive reading for pneumoconiosis by Dr. Brandon (a "B" reader); and, a positive reading for pneumoconiosis by Dr. Minetree (a board-certified radiologist). Two years later, on January 1, 1983 (no reason is given for this delay), the ALJ issued a supplemental order in which he rejected as inadmissible Dr. Rosenstein's reading submitted by Freeman. The ALJ also rejected Dr. Brandon's reading, stating that it was submitted "long after the time provided for the admission of additional evidence."[3] Consequently, the ALJ found that the x-ray reading by Dr. Minetree was sufficient to invoke the interim presumption and, in the absence of rebuttal evidence, Jones was entitled to benefits.

Less than one month later, however, the ALJ reversed his decision and concluded that Dr. Rosenstein's reading was admissible. The ALJ then reasoned that Dr. Rosenstein's reading must be given greater weight than Dr. Minetree's since Dr. Rosenstein was a "B" reader. The

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[2] " 'B' readers are radiologists who have demonstrated their proficiency in assessing and classifying x-ray evidence of pneumoconiosis by successful completion of an examination conducted by or on behalf of the Department of Health & Human Services." *Consolidation Coal Co. v. Chubb*, 741 F.2d 968, 971 n.2 (7th Cir. 1984). The opinion of a "B" reader may be accorded greater weight by a factfinder than the opinion of a reader who is not certified at the "B" level.

[3] Jones submitted the x-ray reading within one month of the date that had been formally set as closing date. Apparently, Jones had been assured informally by the ALJ's office that this late submission would be acceptable. Freeman offered no objection to this late submission.

ALJ therefore vacated his supplemental order awarding Jones benefits and reinstated his original order denying benefits on the grounds that the x-ray evidence did not invoke the presumption. Jones requested the ALJ to reconsider his decision, specifically the exclusion of Dr. Brandon's reading. The ALJ denied Jones' request as untimely and offered that even if he considered the merits of Jones' request his decision would be unchanged.

The Board reversed the ALJ's decision, finding, preliminarily, that Jones' request for reconsideration was timely and, further, that the ALJ should have permitted Dr. Brandon's reading into the record. The Board concluded that based upon the readings by Drs. Brandon and Minetree, the interim presumption was invoked. Further, the Board found the evidence insufficient to establish rebuttal. The Board reversed the ALJ's decision and awarded Jones benefits.

Freeman appeals, contending that the Board exceeded its proper scope of review. Freeman does not appeal the Board's finding that the motion for reconsideration was timely or that the additional x-ray evidence was improperly excluded. Freeman argues only that the ALJ properly weighed the conflicting x-ray evidence and that his findings are conclusive since they are supported by substantial evidence. Freeman requests that we reverse the Board and reinstate the ALJ's denial of benefits.[4]

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[4] In the alternative, Freeman asks that we remand to the ALJ in light of Freeman's only recent discovery that Jones died in 1981. Jones' death certificate stated that he died from acute myocardial infarction. Freeman contends that Jones' death necessitates remand. While a remand of this case is appropriate for the reasons set forth below, Freeman's attempt to secure a remand based on Jones' death during the pendency of his claim is wholly frivolous.

The death certificate provides no information as to whether Jones, a living miner at the time of his application for benefits, was disabled as a result of any respiratory or pulmonary impairment (the critical inquiry in his claim for benefits). Thus, the death

(Footnote continued on following page)

## II.

This court's review is limited in scope. This court reviews the judgment of the ALJ to determine whether it is supported by substantial evidence and is in accordance with the law. *Peabody Coal v. Helms*, 859 F.2d 486, 489 (7th Cir. 1988); *Smith v. Director, OWCP*, 843 F.2d 1053, 1057 (7th Cir. 1988). Substantial evidence is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Richardson v. Perales*, 402 U.S. 389, 401 (1971).

The sole issue is whether the ALJ's decision that the x-ray evidence was insufficient to invoke the interim presumption is supported by substantial evidence and in accordance with the law. It is clear that in issuing his decision on January 20, 1983, the ALJ excluded Dr. Brandon's reading and thus did not consider all relevant medical evidence. Freeman asserts that this omission is excusable, however, because in denying Jones' motion for reconsideration the ALJ allegedly considered this reading and suggested that it would not affect his decision. The ALJ's

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[4] *continued*

certificate is irrelevant to the resolution of Jones' claim and, in any event, would not be probative. *See, e.g., Hillibush v. U.S. Dept. of Labor Benefits Rev. Bd.*, 853 F.2d 197, 204 (3d Cir. 1988) (a death certificate in the absence of an autopsy report may not be used to preclude invocation of presumption of totally disabling respiratory or pulmonary impairment). Similarly, Freeman's contention that Jones' death may require the ALJ to investigate Jones' widow's entitlement to benefits is mere smokescreen. Jones' widow, if an eligible survivor, is entitled to payment of Jones' benefits under his claim filed before January 1, 1982 if Jones' claim was approved prior to his death (which it was) or if by subsequent adjudication it is determined that Jones was eligible for benefits at the time of his death because he was totally disabled due to pneumoconiosis. *See* 20 C.F.R. §§ 725.201(a)(2), 725.212(a). Jones' widow will be entitled to benefits arising out of Jones' claim without filing any additional claim on her own behalf.

We therefore deny Freeman's motion to remand this case to the ALJ for consideration of these issues.

order, although susceptible of such an interpretation, does not state this specifically, and in any event is inadequate since it provides no statement of the ALJ's reasons or basis for crediting one interpretation of the x-ray over two conflicting interpretations.

The ALJ stated simply that "if the merits of the Motion for Reconsideration had been reached, it would have been denied." The ALJ failed to offer any reason why it would have been denied and thus any review of this conclusion is a practical impossibility. Freeman leads the court to understand that the ALJ meant by this statement that if he would have considered all three readings he, nonetheless, would have arrived at the same conclusion. But Freeman offers no suggestion as to how the ALJ could have arrived at that conclusion in the face of conflicting interpretations and the ALJ's decision is certainly devoid of any explanation. The ALJ may have concluded that one negative reading of the x-ray was sufficient to preclude the invocation of the interim presumption under section 727.203(a)(1). This analysis would be clearly erroneous since the Supreme Court in *Mullins Coal Co. v. Director, OWCP*, 108 S. Ct. 427, 438-39 (1987), held that where an ALJ is confronted with conflicting x-rays or conflicting interpretations of the same x-rays the ALJ must weigh this evidence to determine whether it tends to prove or disprove the existence of pneumoconiosis. Assuming that the ALJ followed the dictates of *Mullins* (an assumption about which we can have no sense of its certainty), the ALJ offers no reason why he would credit the reading of Dr. Rosenstein over the readings of Drs. Minetree and Brandon, which both indicated the presence of pneumoconiosis. The ALJ earlier had found Dr. Minetree's reading sufficiently credible in his January 1, 1983 order to invoke the presumption and award benefits. Even if the ALJ accorded the readings by a "B" reader deference, his decision is silent on what factor accounts for his apparent conclusion that the two positive readings for pneumoconiosis—one by a "B" reader and the other by a board-certified radiologist—did not present a significant challenge to the one negative reading by a "B" reader.

It is not the task of this court to speculate on the basis of the ALJ's conclusion. Concomitant with the ALJ's duty to resolve all conflicts in the medical evidence is the responsibility to provide some general articulable basis for rejecting certain key medical evidence that favors or disfavors an award of benefits. *Peabody Coal Co. v. Hale*, 771 F.2d 246, 249 (7th Cir. 1985). At a minimum, the ALJ's opinion must comport with the decisional requirements of the Administrative Procedure Act embodied in 5 U.S.C. § 557(C)(3)(A). The ALJ here failed in this basic task and this court is faced with an inadequate record for an informed review.

The Board faced with this same record simply viewed the conflicting x-ray readings and found that the two positive readings required the invocation of the presumption. The Board's opinion similarly fails to disclose whether the Board weighed the conflicting readings and concluded that a preponderance of the evidence established that Jones was entitled to the presumption. Even if the Board did weigh this evidence, this court cannot accept its decision, despite Jones' urgings. The task of weighing conflicting medical evidence is within the sole province of the ALJ. *Smith v. Director, OWCP*, 843 F.2d 1053, 1057 (7th Cir. 1988). This task may not be usurped by a reviewing body.

On remand, the ALJ should be guided by the directives of *Mullins* and should articulate the reasons for his conclusion. As factfinder, the ALJ must "weigh the quality and not just the quantity of the evidence . . . ." *Mullins*, 108 S. Ct. at 434. The ALJ is not bound to invoke the presumption merely because of numerical superiority of the positive readings, but if the ALJ discounts two positive readings in favor of one negative reading some rational explanation is required. The ALJ properly may give more credence to readings by "B" readers. *See Consolidation Coal Co. v. Chubb*, 741 F.2d 968, 971-73 (7th Cir. 1984). However, where the credentials of the board-certified radiologists providing contrary readings of the same x-ray are practically identical and the evidence conflicts as closely as here, we remind the ALJ of the remedial purpose of

the Act and the stated need to resolve doubts in favor of a disabled miner or his survivor. *See Collins v. Old Ben Coal Co.*, 861 F.2d 481, 490 (7th Cir. 1988).

III.

Accordingly, we grant the petition for review and direct the Board to vacate its decision and order and the decision and order of the ALJ. The Board is ordered to remand the case to the ALJ with instructions that the ALJ is to weigh conflicting x-ray readings pursuant to the dictates of *Mullins* and articulate the basis for his conclusion.

A true Copy:

Teste:

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*Clerk of the United States Court of Appeals for the Seventh Circuit*

# APPENDIX F

## BENEFITS REVIEW BOARD

**BRB No. 83-984 BLA**
**OWCP No. 342-03-2658**

DONALD L. JONES
Claimant-Petitioner

v.

FREEMAN UNITED COAL MINING COMPANY
Employer-Respondent

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR
Party-In-Interest

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DECISION AND ORDER
ISSUED MARCH 30, 1988

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Appeal of the Order of January 20, 1983 and Order Rejecting Motion for Reconsideration of Charles P. Rippey, Administrative Law Judge, United States Department of Labor.

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Before RAMSEY, Chief Administrative Appeals Judge, BROWN, Administrative Appeals Judge, and TAIT, Administrative Law Judge.*

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* Sitting as a temporary Board member by designation pursuant to the Longshore and Harbor Workers' Compensation Act as amended in 1984, 33 U.S.C.A. §921(b)(5) (West 1986).

Harold B. Culley, Jr., West Frankfort, Illinois for claimant; Louis R. Hegeman and Joel Skinner (Gould & Ratner), Chicago, Illinois, for employer.

PER CURIAM:

Claimant appeals the Order of January 20, 1983 and Order Rejecting Motion for Reconsideration (80-BLA-794) of Administrative Law Judge Charles P. Rippey denying benefits on a claim filed pursuant to the provisions of Title IV of the Federal Coal Mine Health and Safety Act of 1969, as amended, 30 U.S.C. §901 *et seq.* (the Act).

This case has been before the Board previously. In *Jones v. Freeman United Coal Mining Co.*, 3 BLR 1-153 (1984), the Board, holding that Dr. Spitz's negative x-ray re-reading violated Section 413(b) of the Act, 30 U.S.C. §932(b), vacated the administrative law judge's finding that the interim presumption was not invoked pursuant to 20 C.F.R. §727.203(a)(1), and remanded the case with instructions that claimant and employer be provided the opportunity to present additional evidence. On remand, the administrative law judge again found the evidence of record insufficient to invoke the interim presumption pursuant to Section 727.203(a). The administrative law judge further found that claimant was not entitled to benefits under 20 C.F.R. Part 410. Claimant moved for reconsideration and the administrative law judge denied the motion on the basis that it was not timely filed. The administrative law judge additionally found that even if the motion had been timely filed, he would have denied it on the merits.

On appeal, claimant argues that his motion for reconsideration should have been considered timely filed pursuant to 20 C.F.R. §802.206(a)(2). Claimant also contends that

the administrative law judge improperly rejected Dr. Brandon's positive x-ray reading as untimely submitted and that further, the evidence is sufficient, when this x-ray reading is considered, to invoke the interim presumption under Section 727.203(a)(1). In response, employer contends that the administrative law judge's denial of benefits is supported by substantial evidence and in accordance with law and therefore must be affirmed.

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is supported by substantial evidence, is rational, and is in accordance with law. 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965); 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a).

Initially, we hold that claimant's motion for reconsideration was timely filed. Claimant's motion did not reach the Office of Administrative Law Judges within the time period prescribed by 20 C.F.R. §725.479 because it was inadvertently mailed first to the Benefits Review Board. Although, under the regulations currently governing procedures before the Office of Administrative Law Judges, claimant's motion might not be considered timely filed, *see* 29 C.F.R. §§18.3(a); 18.4(c)(1), we hold that these regulations are inapplicable to the instant case because they did not become effective until July 15, 1983, after the administrative law judge denied claimant's motion for reconsideration. We, therefore, accept claimant's contention that Section 802.206(a)(2) should apply by analogy to this case, and in the interest of justice, hold that since claimant's motion was submitted to the Board within the prescribed period for filing a motion for reconsideration, the motion was timely filed with the Office of Administra-

tive Law Judges. *See* 20 C.F.R. §802.206(a)(2). *See also Tobrey v. Director, OWCP*, 7 BLR 1-407 (1984).

We also agree with claimant that the administrative law judge erred by refusing to admit into evidence the x-ray report of Dr. Brandon on the basis that the report was untimely submitted. The record reveals that there was a great deal of confusion in this case as to what x-ray evidence had been submitted and could be considered, with the result that between May, 1980, and January, 1983, the administrative law judge issued a number of Orders, sometimes awarding, sometimes denying benefits, before finally settling on a denial of benefits in January, 1983. In the case of Dr. Brandon's x-ray report, claimant asserts that he had a telephone conversation with the administrative law judge's law clerk on November 3, 1981 regarding Dr. Brandon's report, and that although the deadline for submitting new evidence had passed, the clerk granted claimant's attorney permission to submit the report. Claimant then submitted the report on November 19, 1981, without objection from the employer. The administrative law judge did not issue his Order rejecting the report until January, 1983.

Under the circumstances of this case, we hold that fundamental fairness dictates that Dr. Brandon's x-ray report be admitted into evidence. *See generally Gladden v. Eastern Associated Coal Corp.*, 7 BLR 1-577 (1984); *Schoenecker v. Allegheny River Mining Co.*, 5 BLR 1-378 (1982). Additionally, we hold that Dr. Brandon's positive x-ray reading, when considered with the positive reading by Dr. Minetree, invokes the interim presumption pursuant to subsection (a)(1). *See generally Isaacs v. Bailey Mining Co.*, 7 BLR 1-62 (1984). Since the evidence, moreover, is insufficient to establish rebuttal, *see* Supplemental

Decision and Order of October 22, 1981, claimant is entitled to benefits under Part 727. We therefore reverse the administrative law judge's denial of benefits.

Accordingly, the administrative law judge's denial of benefits is reversed and the case is remanded to the Office of the Deputy Commissioner for the payment of benefits.

SO ORDERED.

/s/ ROBERT L. RAMSEY, Chief
Administrative Appeals Judge

/s/ JAMES F. BROWN
Administrative Appeals Judge

/s/ REID C. TAIT
Administrative Law Judge

Dated this 30th
day of March 1988

# APPENDIX G

## OFFICE OF ADMINISTRATIVE LAW JUDGES

**CASE NO.: 86-BLA-794**
**OWCP No. 342-03-2658**

DONALD L. JONES

Claimant

v.

FREEMAN UNITED COAL MINING COMPANY

Employer

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS

Party-In-Interest

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ORDER

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Dated January 20, 1983

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The Order of January 1, 1983 reinstating the Supplemental Decision and Order of October 22, 1981 erroneously stated that the x-ray rereading submitted by the employer was prohibited by §413(b) of the Act from being taken into consideration. That section only prohibits the consideration of rereadings obtained by the Director and not by employers. Dr. Joseph Rosentein whose rereading was submitted by the employer is a certified B reader whose readings must be given greater weight than those of readers who are not so certified.

Therefore, the Order Reinstating the Supplemental Decision and Order of October 22, 1981 is vacated, and the Decision and Order of May 28, 1980 rejecting the claim for benefits under the Act is hereby reinstated.

/s/ CHARLES P. RIPPEY
Administrative Law Judge

# APPENDIX H

## BENEFITS REVIEW BOARD

**No. 80-611 BLA**
**OWCP No. 342-03-2658**

DONALD L. JONES
Claimant-Petitioner

v.

FREEMAN UNITED COAL MINING COMPANY
Employer-Respondent

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR
Party-In-Interest

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DECISION AND ORDER
ISSUED MAY 19, 1981

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Appeal from the Decision and Order of Charles P. Rippey, Administrative Law Judge, United States Department of Labor.

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Before SMITH, Chief Administrative Appeals Judge, MILLER and KALARIS, Administrative Appeals Judges.

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Harold B. Culley, Jr., West Frankfort, Illinois for claimant; Elaine Kaplan (T. Timothy Ryan, Jr., Solicitor of Labor; Laurie M. Streeter, Associate Solicitor; Judith E. Wolf, Co-Counsel for Black Lung Benefits), Washington,

D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

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SMITH, Chief Administrative Appeals Judge:

This is an appeal by Donald L. Jones (hereinafter, the claimant) from a Decision and Order (80-BLA-794) of Administrative Law Judge Charles P. Rippey denying benefits under the provisions of Title IV of the Federal Coal Mine Health and Safety Act of 1969, as amended by the Black Lung Benefits Act of 1972 and the Black Lung Benefits Reform Act of 1977, 30 U.S.C. §901 *et seq.* (hereinafter, the Act).

The claimant contends that the administrative law judge erred in denying invocation of the interim presumption pursuant to 20 C.F.R. §§727.203(a)(1) and (a)(4).[1] Claimant argues specifically that the administrative law judge ignored completely and, therefore, rejected without proper consideration Dr. T. Minetree's x-ray reading which was positive for the presence of pneumoconiosis. 20 C.F.R. §727.203(a)(1). Claimant also challenges the administrative law judge's determination that Dr. Y. N. Chiou's medical opinion fails to establish the presence of a totally disabling respiratory or pulmonary impairment. 20 C.F.R. §727.203(a)(4).

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[1] In the case of a living miner who engaged in coal mine employment for at least 10 years, 20 C.F.R. §727.203(a) permits the invocation of a presumption of total disability due to pneumoconiosis arising out of coal mine employment upon the required showing of any one of the following types of medical evidence: a chest x-ray or biopsy which establishes the existence of pneumoconiosis (20 C.F.R. §727.203(a)(1)); ventilatory or blood gas studies which reveal values equal to or less than the specified table values (20 C.F.R. §§727.203(a)(2) and (3)); other medical evidence, including the documented opinion of a physician exercising reasoned medical judgment which establishes the presence of a totally disabling respiratory or pulmonary impairment (20 C.F.R. §727.203(a)(4)).

The Director contends that, when the administrative law judge rejected Dr. Minetree's positive x-ray reading, the administrative law judge was unaware that Dr. Minetree is a Board-certified radiologist. The Director argues that the case should be remanded so that the administrative law judge may consider the doctor's Board-certified status.

The Board's scope of review is defined by statute. The Decision and Order of the administrative law judge must be affirmed if it is supported by substantial evidence, is not irrational, and is consistent with the applicable law. 30 U.S.C. §932(a) incorporating 33 U.S.C. §921(b)(3); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

First, we consider claimant's contention that the administrative law judge erred by not invoking the interim presumption under Section 727.203(a)(4). The record discloses that Dr. Chiou examined claimant on January 26, 1979, and diagnosed "mild COPD", which the administrative law judge interpretated to mean "mild cardiopulmonary disorder" pursuant to a stipulation by claimant's counsel and the employer. Dir. Ex. 8; Hearing Transcript at p. 48, 49. Dr. Chiou described the severity of the claimant's respiratory or pulmonary disease as "—climbing—not too much ability on lifting now." *Id.* In finding Dr. Chiou's opinion insufficient to invoke the 727.203(a)(4) presumption, the administrative law judge stated:

> It is my conclusion that those words do not meet the test of the regulations which require a reasoned medical judgment which establishes the presence of a totally disabling respiratory or pulmonary impairment. There being no other medical evidence in the record, it follows that the Claimant has not met the requirements contained in Section 727.203(a)(4) of the regulations.

Decision and Order, p. 2.

The Director correctly points out that the notation "mild COPD" is the commonly used abbreviated form for chronic obstructive pulmonary disease, not cardiopulmonary disorder. *The Merck Manual of Diagnosis and Therapy*, 586 (13th ed. R. Berkow, M.D. 1977). Therefore, the parties and the administrative law judge alike erred in their interpretation of this notation. However, we find such error harmless.

Invocation under Section 727.203(a)(4) must be based on "[o]ther medical evidence, including the documented "opinion of a physician exercising reasoned medical judgment" which establishes "the presence of a totally disabling respiratory or pulmonary impairment." 20 C.F.R. §727.203(a)(4). We believe that the diagnosis of a "mild" impairment, whether it be "cardiopulmonary" or "chronic obstructive pulmonary disease", does not meet the requirements for establishing a totally disabling respiratory or pulmonary impairment. Consequently, we affirm the administrative law judge's refusal to invoke the presumption pursuant to 727.203(a)(4).

Next we must determine whether the administrative law judge erred in refusing to invoke the interim presumption under Section 727.203(a)(1). The record contains only two x-ray readings. Dr. T. Minetree interpreted an x-ray taken on January 21, 1979, as positive for pneumoconiosis, type q, 1/1 in all six lung zones. Dir. Ex. 10.[2] On March 25, 1979, Dr. Harold Spitz reread this x-ray as negative for pneumoconiosis, 0/0. Dir. Ex. 9.

The administrative law judge discussed the x-ray evidence as follows:

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[2] Although the signature on this report is not legible, employer's counsel indicated at the hearing that the name was Minetree. Hearing Transcript at 61.

> Although there was one positive x-ray report (Dir. Ex. 10), that film was reread by Dr. Harold B. Spitz, a Certified B Reader, as negative for pneumoconiosis (Dir. Ex. 9), and I accept Dr. Spitz's rereading in reliance upon his credentials as a Certified B Reader.

Decision and Order, p. 2. Relying on Dr. Spitz's negative rereading, the administrative law judge refused to invoke the interim presumption under Section 727.203(a)(1).

Based on our recent decision in *Tobias v. Republic Steel Corp.*, 2 BLR 1-1277 (1981), we conclude that the administrative law judge erred as a matter of law in considering Dr. Spitz's x-ray rereading. In *Tobias*, the Board held that Section 413(b) of the Act, 30 U.S.C. §923(b),[3] prohibits the Director from rereading x-rays for the presence of pneumoconiosis when the threshold requirements of Section 413(b) have been met. The Board further held that neither the Director *nor* the employer can rely on an x-ray rereading taken by the Director after the effective date of the Reform Act (March 1, 1978) in violation of the Section 413(b) prohibition.

In the instant case, as in *Tobias*, the x-ray rereading was taken after the effective date of the Reform Act. Furthermore, all of the threshold requirements of Section

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[3] Section 413(b) reads in part:

> In any case in which there is other evidence that a miner has pulmonary or respiratory impairment, the Secretary shall accept a board certified or board eligible radiologist's interpretation of a chest roentgenogram which is of a quality sufficient to demonstrate the presence of pneumoconiosis submitted in support of a claim for benefits under this title if such roentgenogram has been taken by a radiologist or qualified technician, except where the Secretary has reason to believe that the claim has been fraudulently represented.

30 U.S.C. §923(b).

413(b) have been met: there is other evidence of a pulmonary or respiratory impairment[4]; the x-ray was taken by a radiologist or qualified technician and is of a quality sufficient to demonstrate the presence of pneumoconiosis; Dr. Minetree, who first interpreted the x-ray, is a Board-certified radiologist[5]; and there is no suggestion that the claim has been fraudulently represented.

We therefore conclude that neither the Director nor the employer can rely on Dr. Spitz's x-ray reading and that the administrative law judge's decision denying invocation of the interim presumption under Section 727.203(a)(1) based on Dr. Spitz's x-ray rereading is not in accordance with law. Based on the foregoing, the administrative law judge's decision is vacated and the case is remanded. On remand, however, the claimant and the employer shall be given the opportunity to present additional evidence, including any x-ray rereadings not prohibited by the Board's decision in *Tobias*, *supra*.

Our disposition of this case makes it unnecessary for us to consider the Director's and claimant's remaining arguments.

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[4] Although Dr. Chiou's opinion that claimant suffers from mild "COPD" is insufficient to establish a *totally disabling* respiratory disease necessary to invoke the presumption under Section 727.203(a)(4), it is sufficient "other evidence" of a pulmonary or respiratory impairment. *See* 20 C.F.R. §§727.206(b)(2)(i) and (ii).

[5] We take judicial notice of the fact that Dr. Minetree is listed in the Directory of Medical Specialists as a Board-certified radiologist. Directory of Medical Specialists, p. 31224 (Vol. 3, 19th Ed. 1979-1980).

Accordingly, the Decision and Order of the administrative law judge is vacated and remanded for further proceedings consistent with this opinion.

SO ORDERED.

/s/ SAMUEL J. SMITH, Chief
Administrative Appeals Judge

I Concur: /s/ JULIUS MILLER
Administrative Appeals Judge

KALARIS, Administrative Appeals Judge, dissenting:

I respectfully dissent. While I agree with my colleagues' resolution of the Section 727.203(a)(4) issue, 20 C.F.R. §727.203(a)(4), I cannot agree with their decision to vacate and remand this case for reconsideration of invocation under Section 727.203(a)(1). 20 C.F.R. §727.203(a)(1). I would affirm the administrative law judge.

My colleagues have vacated and remanded this case because of an alleged violation of the Act's x-ray rereading prohibition. *See* 30 U.S.C. §923(b). This issue was not raised by any party to this appeal, and all parties are represented by counsel; I would therefore decline to raise this issue *sua sponte*.

If, however, the issue were properly raised, I would still disagree with my colleagues in two major respects. First, as I stated in my dissent to *Tobias v. Republic Steel Corp.*, 2 BLR 1-1277 (1981), I disagree with any implication that the Section 413(b) rereading prohibition applies only to Director's x-ray rereadings performed after the

effective date of the Reform Act. Thus, while I agree that, if raised, Section 413(b) is applicable to the present case, it is because Section 413(b) is applicable to x-ray rereadings in all cases decided under the Reform Act, even if those rereadings were performed prior to the passage of the Reform Act. Second, my colleagues have assumed that the x-ray rereading in question was performed at the Department's request, an unwarranted assumption apparently based on the presence of the rereading in the Director's exhibits. The Director's exhibits, however, are merely evidence submitted to the deputy commissioner and forwarded to the Office of Administrative Law Judges pursuant to 20 C.F.R. §725.421(b). We have no way of knowing, based on the record as it now stands, who requested or submitted the x-ray rereading in question; thus, there is no way to make a determination as to whether the x-ray rereading violates Section 413(b).

Inasmuch as I would not raise the rereading prohibition in this case, I would affirm the administrative law judge's refusal to invoke Section 727.203(a)(1). The administrative law judge weighed the x-ray evidence, and chose to credit the negative report of a B-reader. This determination is neither irrational nor contrary to law. *See Horvath v. Director*, 6 BRBS 225 (1977). Accordingly, I would affirm the denial of benefits.

/s/ ISMENE M. KALARIS
Administrative Appeals Judge

Dated this 19th day
of May 1981

# APPENDIX I

## OFFICE OF ADMINISTRATIVE LAW JUDGES

**CASE NO.: 80-BLA-794**
**OWCP No. 342-03-2658**

DONALD L. JONES

Claimant

v.

FREEMAN UNITED COAL MINING COMPANY

Employer

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS

Party-In-Interest

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DECISION AND ORDER—REJECTION OF CLAIM

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Dated May 28, 1980

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Before CHARLES P. RIPPEY, Administrative Law Judge

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Harold B. Culley, Jr., for claimant; Robert W. Lewis, for employer.

This Decision and Order arises from the Claimant's application for benefits under the Black Lung Benefits Act, 30 U.S.C. 901 *et seq.* which requires such benefits to be based upon the Claimant's total disability due to pneumoconiosis arising out of his coal mine employment. Under the Act pneumoconiosis means a chronic dust disease of

the lung and its sequelae, including respiratory and pulmonary impairments, arising out of coal mine employment, and is commonly referred to as black lung.

A hearing in this case was held in West Frankfort, Illinois on May 15, 1980, at which the Claimant was present, the Claimant and the Employer were represented by counsel, and the Director did not appear.

The Claimant has approximately 45 years of coal mine employment prior to his retirement on January 2, 1979.

First, the evidence needs to be tested to determine if the Claimant qualifies for the benefits of the liberalized, interim presumption set forth at §727.203 of the regulations.[1] Having more than 10 years of coal mine employment, the foundation would be laid for the arising of the interim presumption if any one of the medical requirements set forth in that section of the regulations is met. It is clear from the evidence contained in the record and was acknowledged by Claimant's counsel at the hearing that neither the evidence regarding x-ray reports, pulmonary function studies, nor blood gas studies met the requirements required by the regulations. Although there was one positive x-ray report (Dir. Ex. 10), that film was reread by Dr. Harold B. Spitz, a Certified B Reader, as negative for pneumoconiosis (Dir. Ex. 9), and I accept Dr. Spitz's rereading in reliance upon his credentials as a Certified B Reader.

The issue in this case is whether Dr. Y. N. Chiou's assessment of the severity of the Claimant's pulmonary

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[1] All the citations to sections of the regulations in this Decision and Order refer to Title 20 of the Code of Federal Regulations.

impairment meets the requirement of §727.203(a)(4) of the regulations as other medical evidence which will support the arising of the interim presumption. That subsection describes the requirement as follows:

> "Other medical evidence, including the documented opinion of a physician exercising reasoned medical judgment, establishes the presence of a totally disabling respiratory or pulmonary impairment."

Dr. Chiou (Dir. Ex. 8) diagnosed the Claimant as having a mild cardio-pulmonary disorder, and when asked to assess the severity of the impairment wrote the words, "—climbing—not too much ability on lifting now—." It is my conclusion that those words do not meet the test of the regulations which require a reasoned medical judgment which establishes the presence of a totally disabling respiratory or pulmonary impairment. There being no other medical evidence in the record, it follows that the Claimant has not met the requirement of §727.203(a)(4) of the regulations. Finally, it must be concluded that since none of the requirements contained in §727.203(a) of the regulations has been met, that the Claimant has not laid the foundation for the arising of the interim presumption.

Claimant's counsel did not even argue that the Claimant might have established his basic entitlement to benefits under part 410 of the regulations without regard to the interim presumption. In this matter I agree with Claimant's counsel. None of the evidence comes close enough to establishing basic entitlement under that Part to warrant meaningful discussion or analysis.

For the foregoing reasons, I must find that the Claimant is not entitled to benefits under the Act.

ORDER

The claim of Donald L. Jones for benefits under the Black Lung Benefits Act is denied.

/s/ CHARLES P. RIPPEY
Administrative Law Judge

*NOTICE OF APPEAL RIGHTS.* Pursuant to 20 C.F.R. 725.481, any party dissatisfied with this Decision and Order may appeal within 30 days from the date of this decision by filing a notice of appeal with the Benefits Review Board, 1111 20th Street, N.W., Suite 757, Washington, D.C. 20036.